The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; JAMES S. GORDON, JR., a married individual,

Plaintiffs,

v.

INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Insurance Co. Of New York; and JOHN DOES, I-X,

Defendants.

NO. 06-cv-01537-JCC

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO LIFT STAY

NOTE ON MOTION CALENDAR:
July 13, 2007

I. INTRODUCTION

Defendant Inviva, Inc. ("Inviva") opposes the Motion to Lift Stay (Dkt. #21, the "Motion") filed by Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni"). In their Motion, Plaintiffs request the opportunity to seek injunctive relief in this lawsuit pursuant to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM"). The Motion is based on the issuance of a final decision in Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). However, this Court's final decision in Virtumundo held that Plaintiffs Gordon and Omni do not have standing under CAN-SPAM. Accordingly, Plaintiffs are

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

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precluded from seeking injunctive relief, and it is pointless to lift the stay for a hearing on their meritless Motion.

II. FACTS

A. Virtumundo Held Plaintiffs Lack Standing Under CAN-SPAM.

In Virtumundo, the same Plaintiffs (Gordon and Omni) alleged violations of CAN-SPAM. (*See* Virtumundo, First Amended Complaint (Dkt. #15) ¶¶ 3.2, 3.3.) The Defendants moved for a summary judgment dismissing all of Plaintiffs' claims. (*See* Virtumundo, Dkt. #98.) In a May 15, 2007 order (the "Order"), this Court granted Defendants' motion, which dismissed Plaintiffs' claims including their CAN-SPAM claim:

> [T]he Court finds that Plaintiffs do not have CAN-SPAM standing.
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> *****
>
> ...even if there is some negligible burden to be inferred from the mere fact that unwanted e-mails have come to Plaintiffs' domain, it is clear to the Court that whatever harm might exist due to that inconvenience, it is not enough to establish the "adverse effect"intended by Congress.
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> *****
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> Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity tht Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

(Order at 13:15; Id. at 13:23-25; Id. at 15:9-14 (emphasis original).) [1]

The alleged email statute violations in Virtumundo occurred during the same time period as the alleged email statute violations in the present matter. In Virtumundo, plaintiffs alleged that email violations commenced in August 21, 2003 and continued

[1] Plaintiffs appealed on June 15, 2007 (Gordon v. Virtumundo, Inc., No. 07-35487 (9th Cir.)).

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until at least February 15, 2006. (Order at 2:19-3:2.) Plaintiffs' alleged damages in the present matter cover a substantially similar time period; commencing "from at least August 2003." Second Amended Complaint (Dkt. #11) at ¶ 7.

B. Plaintiffs' Motion for Injunctive Relief Seeks Relief Under CAN-SPAM.

Plaintiffs' Motion to Lift Stay is "for the limited purpose of hearing Plaintiffs' motion for partial summary judgment" for injunctive relief. Motion at 2:2-3. CAN-SPAM is the sole basis for the relief requested in Plaintiffs' underlying Motion for Partial Summary Judgment (Dkt. #19, the "SJ Motion"):

> There is good cause to lift the stay to hear Plaintiffs' motion in order to effectuate the purpose of the CAN SPAM Act... The Court's failure to do so will send the clear message to Plaintiffs... that they have no remedy whatsoever under the Federal Can-Spam statute.

Motion at 2:11-26. Further, Plaintiffs base their SJ Motion on a claim that they are "adversely affected" by Defendant's alleged actions. (Motion at 2:22-3:1.) To the contrary, this Court has previously determined Plaintiffs have no standing under CAN-SPAM and cannot establish the Congressionally mandated "adverse effect." (Order at 13:15; Id. at 13:23-25.) It is pointless to re-litigate an issue this Court has already resolved. Accordingly, this Court should deny the relief from stay Plaintiffs request.

III. ARGUMENT

In light of this Court's previous ruling in Virtumundo, Plaintiffs' current SJ Motion is meritless. The SJ Motion is based entirely on CAN-SPAM, but Virtumundo determined Plaintiffs have no standing under CAN-SPAM. Consequently, lifting the stay would waste judicial resources by permitting a hearing on a motion which completely lacks merit.

A. The Virtumundo Decision Has a Preclusive Effect in This Lawsuit.

"Collateral estoppel" or "offensive nonmutual issue preclusion" generally prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social

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Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). The application of "offensive nonmutual issue preclusion" is appropriate if:

1. there was a full and fair opportunity to litigate the identical issue in the prior action, *see* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003);

2. the issue was actually litigated in the prior action, *see* Appling, 340 F.3d at 775;

3. the issue was decided in a final judgment, *see* Resolution Trust Corp., 186 F.3d at 1114; and

4. the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action, *see* id.

See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988).

The Court's finding that Plaintiffs were not adversely affected by emails during the subject period meets the Ninth Circuit's test for offensive nonmutual issue preclusion. First, Plaintiffs had a full and fair opportunity to litigate the identical issue in Virtumundo. Second, the issues of standing and adverse effect were litigated and were the basis for the Court's ruling. Third, final judgment was entered in favor of Virtumundo and the other defendants. *See* Virtumundo at Dkt. # 122. Finally, Plaintiffs are the identical parties to the Virtumundo action. The Court's Order in Virtumundo unquestionably has a preclusive effect in this lawsuit.[2]

B. The Virtumundo Decision Determined Plaintiffs Have No Standing to Seek Relief Pursuant to CAN-SPAM.

The Order in Virtumundo held Plaintiffs Gordon and Omni "lack standing to sue under [15 U.S.C.] §7706(g)(1)". (Order at 15:17-18.) This is the statute on which Plaintiffs must rely "to enjoin further violation [of CAN-SPAM] by the defendant". 15 U.S.C. §7706(g)(1)(A). The Order in Virtumundo prevents them from relying on it.

[2] Plaintiffs' appeal has no effect regarding issue preclusion. "Under Washington law, it has been long-established that the pendency of an appeal does not affect the preclusive effect of a judgment rendered at the trial level." Martinez v. Universal Underwriters Ins. Co., 819 F. Supp. 921, 922 (W.D.Wash. 1992).

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Plaintiffs lack standing to obtain an injunction based on alleged violations of CAN-SPAM, which is precisely what they are trying to do here. Since this Court has previously held Plaintiffs may not seek relief under CAN-SPAM, Inviva respectfully requests the Court deny Plaintiffs' Motion to Lift Stay. Otherwise, Plaintiffs will waste judicial resources by re-litigating an issue this Court has already decided.

IV. CONCLUSION

Plaintiffs' Motion to Lift Stay, like their underlying Motion for Partial Summary Judgment, is frivolous. Plaintiffs seek to lift the stay to re-litigate an issue the Court already decided in Virtumundo, which is pointless. Plaintiffs should not be allowed to waste the Court's time by moving for injunctive relief under CAN-SPAM, since this Court previously determined Plaintiffs lack standing under that statute. Accordingly, Inviva requests this Court deny Plaintiffs' Motion to Lift Stay.

DATED this 9th day of July, 2007.

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

By: ______________________________
Derek A. Newman, No. 26967
derek@newmanlaw.com

Attorneys for Defendant Inviva, Inc.

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800